LIBRARY

Office-Supreme Court, U.S.
FILED
MAR 24 1964
JOHN F. DAVIS, CLERK

No. 860

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DES PLAINES CURRENCY EXCHANGE, INC., an Illinois Corporation,

Petitioner,

vs.

JOSEPH E. KNIGHT, DIRECTOR OF FINANCIAL INSTITUTIONS, and MARGARET M. KANE,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT MARGARET M. KANE'S BRIEF IN OPPOSITION

LEONARD D. RUTSTEIN
208 S. LaSalle St.
Chicago, Illinois
Counsel for Respondent
Margaret M. Kane

NORTON WASSERMAN
ROBERT E. GILLESPIE
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Jurisdiction	1
Questions presented	2
Statement	3
Reasons for denying the writ	5
(1.) There is no jurisdiction to grant the writ	5
(2.) There is no conflict of decision	8
Conclusion	10

CITATIONS.

CASES:

American Surety Co. v. Baldwin, 287 U.S. 156	7
Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327	6
Beck v. Washington, 369 U.S. 541, 550	6
California v. Taylor, 353 U.S. 553, 557	8
City of Chicago v. Shayne, 27 Ill. 2d 414, 189 N.E. 2d 324	6
Ferguson v. Georgia, 365 U.S. 570, 572	6
Gonzales v. United States, 348 U.S. 407	9
Hanson v. Denckla, 357 U.S. 235, 243-44	7
Herb v. Pitcairn, 324 U.S. 117, 125-26	8
Herndon v. Georgia, 295 U.S. 441, 443	7
In re Lamkin, 355 U.S. 59	6
Lawn v. United States, 355 U.S. 339, 362	8
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287	9
Radio Station WOW v. Johnson, 326 U.S. 120, 128	7

PAGE

Saladino v. City of South Beloit, 9 Ill. 2d 599, 137 N.E. 2d 364 ..... 6, 7

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 6

Willner v. Committee on Character and Fitness, 373 U.S. 96 9

STATUTES:

28 USCA Section 1257(3) 1, 5

Ill. Rev. Stats. 1961, Ch. 16½, paras. 31, 34.1 .... 3, 6

MISCELLANEOUS:

2 Davis, Administrative Law, Sec. 11.09 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 860

DES PLAINES CURRENCY EXCHANGE, INC., an Illinois Corporation,

Petitioner,

vs.

JOSEPH E. KNIGHT, DIRECTOR OF FINANCIAL INSTITUTIONS, and MARGARET M. KANE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RESPONDENT MARGARET M. KANE'S BRIEF IN OPPOSITION.

JURISDICTION.

This Court lacks jurisdiction over the Petition for Certiorari filed in this proceeding. 28 USCA Section 1257(3) fails to confer jurisdiction because no federal right is in any way involved. Furthermore, no federal question was ever properly raised in the Illinois Courts.

and the Supreme Court of Illinois did not determine a federal question. The decision of the Supreme Court of Illinois is predicated upon entirely adequate non-federal grounds.

Arguments in support of these contentions will be presented in later portions of this Brief in Opposition.

QUESTIONS PRESENTED.

In its statement of "Questions Presented", the Petitioner assumes certain facts which are unsupported by anything in the Record. In the first place, there is no evidence that the administrative decision was "based" upon the report of the hearing officer. Secondly, and as noted in the opinion of the Supreme Court of Illinois, "—there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the (petitioner) ever requested a copy of said report—". The only real questions presented upon the Record before this Court are:

(1) Whether the decision of the Illinois Director of Financial Institutions granting respondent Margaret Kane's application for a currency exchange license was based upon the testimony and other evidence received at the administrative hearing; and

(2) Whether the submission to the Director of Financial Institutions of a hearing officer's findings of fact, recommendations, and conclusions necessarily establishes that the Director based his decision on matters other than the testimony and exhibits.

STATEMENT.

In the summer of 1962, respondent Margaret M. Kane made application for the issuance of a license to operate a currency exchange pursuant to the Provisions of the Illinois Community Currency Exchange Act (Ill. Rev. Stats. 1961, Ch. 16½). Such a currency exchange would be licensed to engage in the business of cashing checks, drafts, or money orders for a fee, and issuing its own money orders (Ill. Rev. Stats. 1961, Ch. 16½, par. 31). The proposed currency exchange was to operate in one of 26 stores located in a shopping center in DesPlaines, Illinois, a suburb of Chicago.

In accordance with the terms of the Community Currency Exchange Act, a hearing was held by a hearing officer designated by respondent Joseph E. Knight, Director of the Department of Financial Institutions. The hearing officer heard evidence regarding the application and submitted the same to the Director, together with certain findings of fact and recommendations (App. III of Petition, pp. 28-35). The respondent Director thereafter entered an order adopting the findings of fact and recommendations of the hearing officer, and pursuant to the authority vested in him by the Community Currency Exchange Act, he ordered the issuance of a license to respondent Margaret M. Kane (App. II of Petition, pp. 35-36).

Petitioner Des Plaines Currency Exchange, Inc., an Illinois Corporation, is and was the operator of a competing currency exchange located four-fifths of a mile from the currency exchange proposed to be operated by respondent Margaret M. Kane. At the hearing conducted before the hearing officer, the petitioner objected

to the issuance of a license to respondent Kane on the grounds that petitioner's financial structure and business would be injured by the competition. The petitioner was afforded an opportunity to, and did, present evidence in support of its objections (App. III of Petition, pp. 28-33).

After obtaining a stay of enforcement of the respondent Director's order, the petitioner appealed to the Circuit Court of Cook County, Illinois. By its own admission, petitioner's contentions in the said Circuit Court were limited to the allegations that (1) the Director failed to examine the record before reaching his decision, and that (2) the Director improperly delegated power to make recommendations to a hearing officer and thereafter illegally considered those recommendations without giving the petitioner the opportunity to oppose them (Petition pp. 4-5). No constitutional question was ever raised in the Circuit Court; indeed, petitioner readily admits that it "did not specifically contend that the statute was in violation of the United States Constitution" (Petition p. 5). In affirming the administrative decision, the Circuit Court expressly found that the findings and conclusions of the hearing officer which were adopted by the respondent Director correctly reflected the testimony and evidence offered at the hearing (App. II of Petition, pp. 26-67).

The petitioner thereupon appealed the decision of the Circuit Court of Cook County, Illinois, to the Supreme Court of Illinois, which affirmed in a written opinion (App. I of Petition pp. 18-23). No constitutional issue was presented to the Supreme Court of Illinois when the case was originally briefed and argued. Thus petitioner is forced to concede that "the question of denial of rights under the Federal Constitution was presented

for the first time as a result of the decision of the Illinois Supreme Court and was asserted in a petition for rehearing" (Petition p. 5). Nor was there a federal question decided even after the petition for rehearing was denied. In referring to the supposed deprivation of due process arising out of the alleged failure to provide petitioner with a copy of the hearing officer's report, the Supreme Court of Illinois stated:

> "A decision on this question is not, however, necessary in the present case, for there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the (petitioner) ever requested a copy of said report, which was dated 13 days prior to the Director's order."

Thus, although petitioner predicates its entire petition upon the proposition that it was deprived of due process of law, it must ultimately admit that "concededly the Supreme Court of Illinois did not expressly decide the question raised herein" (Petition p. 13).

REASONS FOR DENYING THE WRIT

(1) This Court lacks jurisdiction to entertain the writ. No right under the Constitution of the United States has been "specially set up or claimed" as is required under 28 U.S.C.A. Section 1257(3), the statutory provision alleged to confer jurisdiction.

Petitioner is not being deprived of its property without due process of law because none of petitioner's property is at stake. Although petitioner's currency exchange license may be considered a property right which is protected by constitutional guarantees, petitioner certainly enjoys no property right in its present freedom from

competition. On the contrary, petitioner's good fortune in serving an area in which there are no competing currency exchange businesses is a temporary privilege which may be revoked at any time the respondent Director determines that the community will be better served by the creation of additional currency exchange facilities. Ill. Rev. Stats. 1961, Ch. 16½, par. 34.1. Compare *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U.S. 327, which held that a radio station licensee does not obtain any vested interest in any frequency under the Federal Communications Act of 1934. Mere governmental acts of grace do not confer upon their beneficiary any vested rights protected by the Federal Constitution. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. Inasmuch as petitioner has no vested right to a governmental gratuity, this proceeding cannot constitute a deprivation of its property without due process of law, and no federal question is involved. Accordingly, review by this Court is unwarranted.

But even if it is assumed *arguendo* that petitioner's present contentions concern its Constitutional rights, this Court nevertheless lacks jurisdiction to grant the writ. In order to invoke the jurisdiction of this Court, petitioner must demonstrate that it raised the federal question at the appropriate stage of the State Court proceedings. *Beck* v. *Washington*, 369 U.S. 541, 550; *Ferguson* v. *Georgia*, 365 U.S. 570, 572; *In re Lamkin*, 355 U.S. 59. Petitioner has already conceded that it did not raise the supposed Constitutional issue until it filed its petition for rehearing in the Supreme Court of Illinois. Under the Illinois procedure, the issue was waived because it had not been raised in the lower state tribunals. *City of Chicago* v. *Shayne*, 27 Ill. 2d 414, 189 N.E. 2d 324; *Saladino* v. *City of South Beloit*, 9 Ill. 2d 589, 137

N.E. 2d 364. Moreover, this Court has held on numerous occasions that raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the State Court actually grants the petition and expressly decides the federal question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (6); *Hanson* v. *Denckla*, 357 U.S. 235, 243-44; *Herndon* v. *Georgia*, 295 U.S. 441, 443; *American Surety Co.* v. *Baldwin*, 287 U.S. 156. In the case at bar, the petition for rehearing was never granted and the Supreme Court of Illinois never decided the issue. Nor can the petitioner claim that it was prevented from raising the Constitutional issue at an earlier stage of the proceeding. Petitioner's complaints about the alleged secrecy of the hearing officer's report and the lack of opportunity to attack it began as early in the litigation as the Circuit Court of Cook County, Illinois (Petition, pp. 4-5). However, it was not until the filing of the petition for rehearing that Constitutional rights were invoked in support of these complaints. Since the alleged Constitutional infirmities were not properly urged in the State Courts, there is no basis for granting review by this Court on certiorari.

Wholly apart from the fact that the federal question was never properly presented, it is apparent from the opinion of the Supreme Court of Illinois that the decision of the court was not based on federal grounds. Rather, that court simply held that the administrative decision was based upon the testimony and other evidence received at the hearing, and no decision on the effect of the alleged unavailability of the report was deemed necessary because there was no evidence in the record indicating its unavailability. Because the opinion of the Supreme Court of Illinois did not render a decision

based upon a federal right, and because the decision is founded exclusively upon adequate non-federal grounds, there is no basis for review by this Court. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6.

The petitioner has also urged that it was deprived of its property without due process of law because it was never afforded an opportunity to litigate the issue of whether the Director examined the record (Petition 15-16). This due process argument is of such recent vintage that petitioner did not even urge it in the petition for rehearing filed in the Supreme Court of Illinois. Once again the point cannot be considered because it was not urged or briefed below. *California* v. *Taylor*, 353 U.S. 553, 557; *Lawn* v. *United States*, 355 U.S. 339, 362.

(2) There is no conflict between the decisions of this Court and the decision herein sought to be reviewed. The Supreme Court of Illinois did not pass upon the issue of whether the Federal Constitution required the hearing officer's report to be made available to petitioner. After remarking that Professor Davis rejected the idea that this was a constitutional requirement (2 Davis, Administrative Law, sec. 11.09), the Illinois court found that it was unnecessary even to consider the question because the record did not show the report to be unavailable or that petitioner was deprived of an opportunity to object thereto. Thus, there is no conflict between this decision and the decisions which petitioner contends enunciate the principle that the report must be made available.

Petitioner urges that the Illinois court improperly avoided the constitutional issue, and that this Court ought to look behind the "avoidance" and grant the writ. Such a contention comes with ill-grace from a party which did not properly urge the issue in the state court,

and did not prove the factual basis for its present complaint. In any event, the case upon which petitioner relies in support of its contention is in no way pertinent. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, the Constitutional issue of free speech was properly presented in the state court, and this Court accepted the state court's factual determination concerning the nature of the picketing there involved. The case in no way holds that this Court is authorized to look behind state court findings of fact just because constitutional claims are made.

Finally, there is no basis for petitioner's argument that this Court has established a constitutional requirement of availability and opportunity to object to all interim reports prepared in the administrative process. Neither *Gonzales* v. *United States*, 348 U.S. 407, nor *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, announced such a broad constitutional principle. In *Gonzales*, an alleged conscientious objector was convicted for his refusal to submit to induction into the armed forces. This Court reversed the conviction, holding that the draft classification upon which the conviction was founded was illegal in that the defendant had never been furnished with written recommendations submitted to the administrative agency responsible for making the draft classification. The Court's holding was based upon its conclusion that the Universal Military Training and Service Act required that such a report be furnished to the draft registrant. No interpretation of constitutional rights was in any way involved. In *Willner*, an applicant for a license to practice law was denied a license despite the fact that he was never given a hearing or other opportunity to confront or cross-examine persons who submitted adverse reports about him. This Court held

that procedural due process had been violated, not because of the secrecy of advisory reports, but because the applicant was never afforded a hearing to rebut the accusations made against him.

CONCLUSION

This litigation involves an attempt by one business enterprise to guarantee its own success by using the administrative and judicial processes as an artificial means of preventing competition. By taking successive appeals through the court system of Illinois, petitioner has managed to postpone the operation of a competitor for several years. It now seeks to prolong this moratorium on competition by injecting into the late stages of this case a supposed constitutional issue which was never presented to nor decided upon by the lower courts. This Court ought not to grant certiorari to review petitioner's afterthought.

For all of the reasons advanced in this brief, it is respectfully urged that the petition be denied.

Respectfully submitted,

Leonard D. Rutstein
208 S. La Salle St.
Chicago, Illinois,
Counsel for Respondent
Margaret M. Kane.

Norton Wasserman
Robert E. Gillespie
Of Counsel.